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IN THE

Supreme Court of the United States

BURLINGTON NORTHERN & SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*. Letters of consent from both parties have been filed with the Clerk of the Court. The brief supports the petition for a writ of certiorari.[1]

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 320 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

EEAC's members are all employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. §§ 2000e *et seq.*, and other laws against employment discrimination and retaliation. As business enterprises in a competitive economy, they have important obligations to maintain productivity, efficiency and discipline in their workplace operations. EEAC's members, therefore, have a significant interest in the issues raised by the Petition for Writ of Certiorari, which put in question whether an employer can be found to have retaliated against an employee in violation of Title VII simply by changing the employee's assigned job tasks in a way that does not result in any change of job classification, pay or status, or by temporarily suspending the

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[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

employee from service pending an internal investigation, after which the employee is restored to active service with no loss of pay or other adverse consequence, as well as the appropriate burden of proof on a claim for punitive damages under Title VII.

The court below answered the first two of these questions in the affirmative, essentially dispensing with the requirement that a Title VII retaliation plaintiff show a materially adverse employment action by the employer. In the lower court's broad view, unlawful retaliation can take the form of virtually "*any kind* of adverse action." Pet. App. at 22a. The court also erroneously ruled that the standard of proof for an award of punitive damages is a mere "preponderance of the evidence." *Id.* at 28a-34a.

These issues are extremely important to the nationwide employer constituency that EEAC represents, and EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its experience in these matters, EEAC is well situated to brief the Court on the concerns of the business community and the significance of this case to employers. EEAC seeks to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not been brought to its attention by the parties.

STATEMENT OF THE CASE

When Burlington Northern & Santa Fe Railway Co. (BNSF) hired Sheila White in June of 1997 as a track laborer, she initially was given the responsibility of operating a forklift, along with other track laborer duties. Pet. App. at 3a. In September of that same year, White complained to management that her foreman treated her differently from male employees and had made two inappropriate remarks. Pet.

App. at 4a. The company conducted an immediate investigation and then suspended the foreman without pay for ten days and ordered him to attend sexual harassment training. *Id.*

During the investigation, BNSF heard complaints from other more senior employees that White was receiving preferential treatment. *Id.* More specifically, complaints centered on the fact that White was allowed to spend the majority of her workday operating the forklift, while track laborers with greater seniority were required to work exclusively on tracks. *Id.* The employees who voiced these complaints apparently viewed forklift work as less difficult, and therefore more desirable, than track work. *Id.* In response to these complaints, BNSF gave the task of operating the forklift back to a more senior track laborer who had performed the function before White was hired. *Id.*

Approximately six months later, White apparently refused a direction from another foreman, and he suspended her for alleged insubordination, pending an investigation. *Id.* at 6a. After senior management concluded that the foreman had overreacted, BNSF reinstated White to her former position with full back pay and benefits. *Id.* at 7a.

White sued BNSF for sexual harassment and retaliation under Title VII. *Id.* The jury found in favor of BNSF on the sexual harassment claim, but found in White's favor on her retaliation claims. *Id.* BNSF moved for judgment as a matter of law or, in the alternative, for a new trial, contending that White had failed to establish retaliation under Title VII. *Id.* The district court denied the motion, and BNSF appealed that ruling to the Sixth Circuit. *Id.*

A panel of the Sixth Circuit reversed, finding that a minor adjustment in work assignments and a temporary suspension with full back pay and benefits did not constitute "adverse employment actions" and, therefore, were not actionable under Title VII. Pet. App. at 97a. White asked the full court

to rehear her claim, and the court agreed to do so. *Id.* at 123a. The decision of the *en banc* court initially stated that the proper standard for determining what is an actionable adverse employment action is whether the employer's action resulted in a "materially adverse change in the terms and conditions of [the person's] employment." Pet. App. at 10a. (citation and footnote omitted). The court went on to conclude, however, that discrimination can be "*any kind* of adverse action." *Id.* at 22a. (citation omitted). Applying this standard, the court went on to rule that a temporary suspension, even one that ultimately results in the employee's reinstatement with full back pay, as was the case here, constitutes a materially adverse change in employment. *Id.* at 22a-23a. The court also concluded that a simple change in an employee's job duties constitutes a materially adverse change in employment, even if the new duties the employee is expected to perform are within the scope of his or her job classification. *Id.* at 25a. Finally, the *en banc* court ruled that the proper standard for submitting punitive damages to the jury was a "preponderance of the evidence" standard, rather than the more exacting "clear and convincing" burden of proof. *Id.* at 32a-33a.

BNSF filed the instant Petition for a Writ of Certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

There is a sharp division among the circuit courts of appeals as to whether a claim of retaliation is actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, if the plaintiff did not experience a materially adverse change in his or her terms or conditions of employment as a result. The Sixth Circuit below, while paying lip service to the "materially adverse" requirement, nevertheless adopted a standard, inconsistent with several other circuits, essentially allowing a claim to go forward if it

involves "any kind of adverse action." Pet. App. at 22a. This Court's review is necessary to resolve the discord.

Moreover, a standard that makes actionable *any* adverse action infringes substantially on an employer's ability to run its business. Title VII was not intended to "'diminish traditional management prerogatives.'" *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979)). Few actions are more central to traditional management prerogatives than assigning specific job tasks to be performed by employees and maintaining order and discipline in the workplace. Yet the decision of the Sixth Circuit below severely diminishes management's prerogatives in both of these critical areas.

Under the court's ruling, once an employee has complained of discrimination, virtually every subsequent change in that employee's assigned job duties becomes a potential basis for a retaliation claim under Title VII, even if all tasks assigned to the employee are within his or her existing job description and the employee suffers no reduction in pay or loss of status. By literally making a potential "federal case" of virtually every routine change in work assignments, this interpretation of Title VII effectively would empower employees to pick and choose which of their assigned job functions they will perform, backing up their rejection of other assignments with threats of costly, time-consuming retaliation suits.

The decision below also would pose a dilemma for employers attempting to maintain workplace discipline. Employers are obligated to prevent sexual harassment, violence, illegal drug use and other serious workplace offenses. They also have a business responsibility to maintain order in the workplace. Customarily, the first step most employers take when an employee is suspected or accused of serious job misconduct, including insubordination, is to place the employee on suspension or administrative leave pending an

inquiry. If the inquiry confirms the employee's offense, the employer takes appropriate disciplinary action; otherwise, the employer returns the employee to active service, usually without penalty or loss of pay. Under the Sixth Circuit's ruling, however, employers would risk liability for retaliation any time they took this traditional approach in dealing with allegations of misconduct by an employee who previously had complained of discrimination. Thus, employers would be forced to make a Hobson's choice between allowing potentially dangerous or disruptive individuals to remain in the workplace, or suspending them pending investigation and thereby risking liability for retaliation.

Title VII's antiretaliation section should not be interpreted so as to impinge so severely on management's traditional prerogatives to assign work and administer discipline. Instead, that section is aimed solely at retaliatory actions that are materially adverse to the employee. Yet, the federal courts of appeals are presently divided over this very issue, with two other appeals courts having taken the same broad approach as the court below to conclude that virtually any unpleasant action can constitute unlawful retaliation. While several others properly limit recovery for Title VII retaliation to actions materially adverse to the employee, a decision by this Court is needed to resolve this disagreement and restore the legal certainty employers need in order to craft uniform workplace rules.

Moreover, for all of the reasons set forth in the Petition, as well as because of the unique nature of employment disputes, the court below erroneously concluded that punitive damages may be awarded to a Title VII plaintiff on a mere "preponderance of the evidence." Congress reserved punitive damages for cases involving an extraordinary degree of culpability on the part of an employer. For that reason, the "clear and convincing evidence" standard most appropriately applies. Anything short of this standard would only serve to under-

mine Title VII's carefully constructed remedial scheme and frustrate the important statutory goals of "conciliation, conference and persuasion."

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW OF THE DECISION BELOW TO ADDRESS A SHARP DIVISION AMONG THE CIRCUIT COURTS OF APPEALS ON THE QUESTION OF WHETHER TITLE VII'S ANTIRETALIATION SECTION IS VIOLATED WHERE THE PLAINTIFF SUFFERS NO "MATERIALLY ADVERSE" CHANGE IN TERMS OR CONDITIONS OF EMPLOYMENT

A. The Circuit Courts Are Divided On Whether A Materially Adverse Employment Action Is An Essential Element Of Unlawful Retaliation Under Title VII

Section 704(a) of the 1964 Civil Rights Act, commonly known as Title VII's "antiretaliation" section, makes it unlawful for an employer to discriminate against an employee because the employee has opposed a practice prohibited by Title VII or filed a charge with the Equal Employment Opportunity Commission (EEOC), given testimony, or otherwise participated in a proceeding under that statute. 42 U.S.C. § 2000e-3(a). To establish unlawful retaliation under Section 704(a), as the court below stated, a plaintiff must show: (1) that she engaged in an activity protected by Title VII; (2) that the employer took an employment action adverse to the plaintiff; and (3) that there was a causal connection between the protected activity and the adverse employment action. Pet. App. at 11a.

The dispute in this case centers on the second element in this formulation—*i.e.*, the requirement that a plaintiff show an "adverse" employment action by the employer. As the

Petition indicates, the federal courts of appeals are deeply divided over the appropriate standard for determining when an employer has unlawfully retaliated against an employee for the purposes of Title VII. Pet. at 10-17. The majority of courts have taken the sensible position that a person claiming retaliation must show some action that resulted in a "materially adverse change" in the terms and conditions of the person's employment. Most courts recognize that "materially adverse change" should parallel the requirement of this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), that a plaintiff show a "tangible employment action." The two courts that are the most consistent with *Ellerth* and *Faragher* have said that only adverse treatment with regard to some "ultimate employment decision"—such as hiring, granting leave, discharging, promoting, and compensating—can support a retaliation claim. *Brazoria County, Tex. v. EEOC*, 391 F.3d 685, 692-93 (5th Cir. 2004); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997). Under this view, actions such as warnings, negative performance appraisals, and lateral reassignments generally cannot be used as the basis for retaliation claims.

Although the court below purported to apply the "materially adverse" standard, in reality it did not. Initially the court said that it rejected the position taken by Respondent that *any* adverse treatment based on a retaliatory motive is unlawful. Later in the opinion, however, the court did a complete about-face, ruling that "the words 'discriminate against' literally mean '*any kind* of adverse action.'" Pet. App. at 22a. Then, demonstrating just how broad it intended the standard to be, the court concluded that an employer commits unlawful retaliation by simply asking an employee to perform the job for which she was hired and by placing her on a temporary suspension pending an investigation into possible miscon-

duct, even though the suspension was later rescinded and the employee fully compensated for time she was not at work.

Other courts have taken broader views, ruling that almost any unpleasant action by an employer (whether material to the terms or conditions of the person's employment or not) can be the basis for a retaliation claim if it is based on a retaliatory motive. The Court of Appeals for the Ninth Circuit has said, for example, that "an adverse employment action" in a retaliation case can be almost any employment action by an employer if it is based on a retaliatory motive and is "reasonably likely to deter" an employee from engaging in protected activity. *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000) (quoting EEOC Compliance Manual Section 8, "Retaliation," ¶ 8008 (1998)). *See also Washington v. Illinois Dep't of Revenue*, No. 03-3818, 2005 U.S. App. LEXIS 17977 (7th Cir. Aug. 22, 2005) (holding that even actions outside the workplace can be the basis of a retaliation claim).

The Sixth Circuit has rejected the Fifth, Eighth, and Ninth Circuit tests, but it so diluted the "materially adverse" standard as to allow anything to satisfy it, in further conflict with other courts that have adopted the same nominal standard. The wide disparity between the views of the courts of appeals on this issue merits this Court's review.

B. The Requirement That A Retaliation Claimant Be Able To Show A Materially Adverse Employment Action Is Fully Consistent With Supreme Court Decisions Interpreting Title VII

This Court went to significant lengths in its *Ellerth* and *Faragher* decisions to make clear that its concept of "tangible employment actions" is limited to actions that have material, adverse effects on employees' terms or conditions of employment. In the Court's words:

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing,

> failing to promote, reassignment *with significantly different responsibilities*, or a decision causing a significant change in benefits.

Ellerth, 524 U.S. at 761 (emphasis added). Indeed, the Court explicitly stated that "[a] tangible employment action in most cases inflicts direct economic harm." *Id.* at 762. To conclude that the Court intended this term to include inconsequential changes in job assignments of the sort involved in this case, as the court below has done, is a distortion of the Court's decisions.

Similarly, while the Court also recognized in *Ellerth* and *Faragher* that actions other than "tangible employment actions" can constitute unlawful discrimination under the "hostile environment" theory, it made clear in those decisions, as it has in the past, that to rise to the level of actionable discrimination under Title VII, the actions in question must be so "severe or pervasive" as to have "altered terms or conditions of employment." *Ellerth*, 524 U.S. at 752 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986)). Again, these references reflect the Court's recognition that Title VII does not address petty or routine workplace irritations or disappointments, but only actions sufficiently serious to adversely affect an employee's employment in a material way.

C. Unless A Materially Adverse Employment Action Is Required To Establish Unlawful Retaliation Under Title VII, Virtually Every Employer Action And Reaction Following A Complaint Alleging Discrimination Will Require Litigation

The rule that a plaintiff must show a materially adverse employment action to establish unlawful retaliation under Title VII distinguishes actual discrimination from mere unpleasantness and disappointment of the sort employees often

experience in relations with their supervisors and managers. "Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." *Marerro v. Goya of P.R., Inc.*, 304 F.3d 7, 23 (1st Cir. 2002) (quoting *Blackie v. Maine*, 75 F.3d 716, 725 (1st Cir. 1996)).

Every employee has the right to file charges with the EEOC and to oppose conduct he or she reasonably believes is unlawful under Title VII.[2] And every employee who has exercised these rights has the potential to become a retaliation plaintiff. EEOC statistics show that retaliation charges are now the fastest-growing category of charges filed under Title VII, having roughly doubled over the past decade.[3] If the courts do not keep the standard for establishing retaliatory conduct at a level that materially affects the employment relationship, these numbers can be expected to increase even more dramatically, with resulting effects on caseloads not only of the EEOC, but also of the federal courts themselves.

Section 704(a) is designed to assure that employees who exercise their Title VII rights do not suffer discrimination in employment as a result. It is not, however, designed to vaccinate such employees against legitimate discipline or supervi-

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[2] Several courts have ruled that an employee's opposition to a practice the employee reasonably regards as a Title VII violation is protected under Section 704(a), even if the employee's belief is mistaken. *E.g.*, *Taylor v. Runyon*, 175 F.3d 861, 869 (11th Cir. 1999); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769 (2d Cir. 1998); *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994).

[3] The statistics reported on EEOC's website show that Title VII charges alleging retaliation increased from 10,499 in Fiscal Year 1992 to 20,240 in Fiscal Year 2004 and, during that same period, grew from 14.5 percent to 25.5 percent of all Title VII charges filed with the agency. EEOC Charge Statistics, FY 1992 Through FY 2004, *available at* http://www.eeoc.gov/stats/charges.html.

sory control. "Engaging in protected activities or protected conduct should not put the plaintiff in a better position than she would be in otherwise." *Ruggles v. California Polytechnic State Univ.*, 797 F.2d 782, 786 (9th Cir. 1986) (citation omitted).

Employees who have accused their employers of discrimination are likely to view every subsequent action and reaction by their employers through a prism of suspicion and distrust. Given the costs of litigation, if every reassignment of tasks within their job classification could serve as a viable basis for a retaliation suit, such employees would have an effective veto power over routine work assignments and supervisory directives they did not happen to like. Such an interpretation of Title VII would be at odds with the fundamental purpose of the statute, which was not intended to "diminish traditional management prerogatives." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979)). The requirement that a retaliation claimant be able to show a materially adverse employment action prevents this unintended result, while assuring that employees' rights are protected.

D. Neither A Reassignment To Different Tasks Within The Same Job Classification Nor A Temporary Suspension Pending An Internal Investigation Amounts To Discrimination Under Title VII

In this case, White claims that BNSF discriminated against her by relieving one job duty—operating a forklift—so that she could perform other track maintenance work. Yet it is undisputed that both track maintenance and forklift work fell within the designated duties of her job classification ("track laborer"), that track maintenance responsibilities had always been part of White's job, and that the reassignment resulted in no change in her classification, rate of pay or benefits. Pet. App. at 95a.

Assignment of tasks and responsibilities to individual employees has long been recognized in labor law as a fundamental prerogative of management. *See generally* ABA Section of Lab. & Empl. Law, *Elkouri & Elkouri: How Arbitration Works*, 697-705 (Alan Miles Ruben ed., BNA 6th ed. 2003), and authorities therein cited. Reassigning an employee to different duties within his or her existing job classification, without significantly changing pay or benefits, is not regarded as a sufficiently "material, substantial, and significant change" in terms or conditions of employment to require collective bargaining under the National Labor Relations Act. *E.g.*, *Alamo Cement Co.*, 277 N.L.R.B. 1031 (1985) (footnote omitted); *see generally* 1 ABA Section of Lab. & Empl. Law, *The Developing Labor Law* 1220-23 (BNA 4th ed. 2000 & Supp. 2004). Thus, an employer's mere, routine exercise of the authority to assign or reassign job tasks to employees does not, without more, amount to a change in their employment status, compensation, terms, conditions, or privileges of employment, and therefore cannot constitute actionable discrimination under Title VII.

White also claims that BNSF discriminated against her by suspending her pending an internal inquiry into a supervisor's determination that she had been insubordinate. Yet it is undisputed that the suspension was only temporary, that White was returned to active service upon completion of the inquiry, and that she ultimately suffered no loss of pay or benefits or other employment-related detriment. Thus, again, no material adverse action had occurred.

Employers regularly conduct internal workplace investigations. Indeed, they are under ever-increasing legal obligations to do so. The Supreme Court's sexual harassment holdings in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), delineate employers' responsibilities under Title VII to investigate all employee complaints of sexual harassment

promptly and take appropriate steps to correct such harassment when they find it. Subsequent court decisions have extended these obligations to allegations of racial harassment and other discriminatory practices, as well. *See, e.g., Hill v. American Gen. Fin., Inc.*, 218 F.3d 639 (7th Cir. 2000) (racial harassment); *Walker v. Thompson*, 214 F.3d 615 (5th Cir. 2000) (racial harassment and retaliation); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264 (10th Cir. 1998) (same). Employers also are obligated to conduct workplace investigations under the Occupational Safety and Health Act, 29 U.S.C. § 654(a)(1), the Drug-Free Workplace Act, 41 U.S.C. §§ 701-07, the Securities and Exchange Act, 15 U.S.C. §§ 78o(b)(4)(E) and 78o(f), and numerous other laws.

Where allegations of serious employee misconduct are at issue, a customary first step in conducting such internal investigations is to place the accused employee on suspension or administrative leave pending the outcome of the inquiry, just as BNSF did with the foreman whom White claimed sexually harassed her. This gives the employer time to ascertain the facts and decide on an appropriate response, without risking the disruption or additional misconduct that could occur if the accused were allowed to remain in the workplace in the interim. In many instances, this preliminary step is necessary to prevent interference with the investigation itself. In some cases, too, it is necessary to remove an accused wrongdoer from the premises after the employer has been placed on notice of his or her alleged misconduct because failure to do so could expose the employer to liability for negligence, or worse, if the same individual were to commit subsequent actions that caused injury to coworkers, customers or others. The temporary suspension procedure thus protects important interests of the employer and others during the pendency of the investigation.

At the same time, the suspension procedure does not adversely affect the suspended employee, because if the inquiry results in a determination that the allegations of

misconduct were unfounded—or, as in this case, that a supervisor "overreacted"—the employer can rescind the suspension and restore the employee's pay for the interim period, as BNSF did here. Thus, the suspension is merely temporary, and ultimately results in no adverse employment action at all, material or otherwise. Quite the contrary, where the procedure is administered as it was in this case, its only net consequence is that the employee has received an extra period of time off with full pay—hardly an adverse employment action.

The court below specifically acknowledged EEAC's concern that employers maintain the prerogative to suspend employees who are suspected of wrongdoing pending an investigation, lest they be placed in the untenable position having to choose between keeping suspected wrongdoers in their workplace or facing potential Title VII liability. Apparently without much thought, however, the court dismissed this concern, suggesting employers may avoid liability simply by continuing to pay employees while they are on temporary suspension.

Unfortunately, this is not a workable solution. Where the employer discovers during the course of an investigation that a suspended employee has engaged in serious misconduct, many state wage payment laws would make it difficult—and in many cases impossible—for the employer to recover paychecks awarded the employee during the suspension. *See, e.g.*, Cal. Lab. Code § 450; Md. Code Ann., Lab. & Empl. § 3-503. Accordingly, an employee found to have engaged in serious misconduct would be *rewarded* with a paid vacation before his well-deserved termination. Such a practice sends the wrong message both to the wrongdoer and other employees, as well as undermines the credibility of the employer's disciplinary process. It also leaves the door open for unscrupulous employees to abuse the system in order to secure additional paid time-off for themselves, further eroding the employer's efforts to prevent future misconduct.

Moreover, a policy of paying employees temporarily suspended because of suspected misconduct is also costly. Even an *unpaid* temporary suspension imposes significant financial and operational costs on an employer. If also required to pay wrongdoers for work not performed, employers might simply abandon the practice altogether, even when the suspected misconduct is serious. The likely result will be greater exposure to liability for employers for negligence and an overall increase in employment litigation. Ultimately, interpreting Title VII so as to cause employers to abandon this common and very sound business practice will disadvantage both employers and workers. On the other hand, the employer's ability to maintain a safe, effective and orderly work environment is in no way compromised by a disciplinary process that suspends an employee without pay until such time as an internal investigation clears her of wrongdoing.

E. A Decision By This Court Is Needed To Resolve The Circuit Conflict And Restore Legal Certainty For Employers

EEAC's member companies conduct business in multiple states across the nation, and they seek to establish uniform, company-wide policies that are consistent with the federal nondiscrimination laws. This effort is undermined if there is inconsistency and instability in the federal employment laws that apply to employees located at different geographic locations. Simply put, employers cannot develop uniform disciplinary procedures for their workers across the country if they face retaliation claims challenging those procedures by employees who work at sites located in some circuits.

While the very common practice of temporarily suspending an employee pending an investigation into misconduct, as well as minor changes to an employee's day-to-day work

responsibilities, would be perfectly lawful under the "materially adverse change" standard, these same actions would be prohibited under the unmanageably broad approach of the Sixth and Ninth Circuits. A decision by this Court is needed to resolve this disagreement and restore the legal certainty employers need to ensure safe and efficient operations at workplaces around the country. For the reasons set forth in this brief, and in the petition, plaintiffs claiming unlawful retaliation must be required to show that their employer took some materially adverse employment action against them, beyond a mere change in assigned tasks within the same job classification or a temporary suspension during the pendency of an internal investigation.

II. "CLEAR AND CONVINCING EVIDENCE" IS THE APPROPRIATE EVIDENTIARY STANDARD FOR AN AWARD OF PUNITIVE DAMAGES IN A TITLE VII CASE

Also at issue in this case is the appropriate standard of proof for an award of punitive damages under Title VII. Although Congress unquestionably recognized all acts of intentional discrimination as reprehensible, the structure and wording of the 1991 amendments to Title VII make clear that it intended to reserve the remedy of punitive damages for cases involving an extraordinary degree of culpability on the part of an employer. *See Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534 (1999) (holding that "Congress plainly sought to impose two standards of liability—one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award.") While those amendments may be silent as to the evidentiary standard that should be applied in a case where an award of punitive damages is sought, for all of the reasons set forth in the petition, punitive damages should be awarded only where the plaintiff has shown by *clear and convincing*

evidence that a defendant has acted "with malice or reckless indifference." 42 U.S.C. § 1981a(b)(1).

We need not reiterate in this *amicus* brief the petitioner's very thorough analysis to demonstrate the correctness of its conclusions. We merely highlight one additional observation, that any lesser burden of proof for an award of punitive damages is particularly inappropriate in employment cases because of the unique nature of employment disputes. Unlike typical tort and contract claims, employment controversies do not take place between strangers. The plaintiff and defendant in an automobile accident case probably never met before they collided. The parties to an ordinary breach of contract claim have no ties other than the contract itself. In contrast, most labor and employment disputes involve individuals and companies with an ongoing relationship that began before the dissention and in many cases is expected to continue after the parties' differences are resolved.

For this reason, Title VII encourages conciliation and resolution rather than litigation:

> Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. . . . *Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.* To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (emphasis added) (citations omitted).

Accordingly, when Congress added compensatory and punitive damages to Title VII in 1991, 42 U.S.C. § 1981a, it tempered the potential effect by capping the amount at a combined total of $300,000 as discussed above. In addition, Congress specifically reiterated its commitment to enforcement of Title VII in ways other than litigation, stating that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." P.L. 102-166, § 118, codified as 42 U.S.C. § 1981 note.

Allowing punitive damages to be awarded on a mere "preponderance of the evidence" will make the award of such damages commonplace, circumventing the Congress' intent that punitive damages be awarded only in extraordinary cases and seriously hampering conciliation efforts. Federal judges, who are ideally situated to observe the effects of different remedial schemes on the volume of litigation and the willingness before them to settle, have found even general damages awards to be a serious impediment to conciliation and settlement in employment litigation.

The potential negative effect that the unbridled availability of general damages can have on the conciliation process was best expressed by courts that wrestled in the late 1970's and early 1980's with the issue of whether compensatory damages could be recovered under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, which authorizes the award of both "legal" and "equitable" relief. 29 U.S.C. § 626(b). These courts agreed that the hope of such awards would "severely cripple the mediation process." *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036, 1039 n.8 (5th Cir. 1977). *See Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834, 841 (3d Cir. 1977) ("Haggling over an appropriate

sum could become a three-sided conflict among the employer, the [EEOC], and the claimant"); *Dean,* 559 F.2d at 1039 ("The silence of the Act with respect to general damages is entirely consistent with legislative intent to abstain from introducing a volatile ingredient into the tripartite negotiations involving [EEOC], employee and employer which might well be calculated to frustrate rather than to 'effectuate the purposes' of the Act") (footnote omitted); *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147 (2d Cir. 1984) ("If an individual alleging discrimination knew he could recover compensatory damages if he refused to settle during the administrative process and commenced a civil suit, he would have little incentive to resolve the dispute during the conciliation process"); *Sant v. Mack Trucks, Inc.*, 424 F. Supp. 621, 622 (N.D. Cal. 1976) ("If large tort recoveries are allowable under the ADEA, it is doubtful that alleged age discriminatees will enter into good faith conference and conciliation when around the corner lies the possibility of large dollar pain and suffering recoveries"). As these judges observed, the hope of a "big ticket" damages award at trial is a major disincentive to conciliation.

Thus, lowering the standard of proof to a mere "preponderance of the evidence" undermines Title VII's carefully constructed remedial scheme. Rather than furthering the statutory goals of "conciliation, conference and persuasion," reports of punitive damages awards easily won by a plaintiff dangles the hope of a windfall jury verdict in front of those whose better interests would be served by a mutually agreed-upon settlement.

CONCLUSION

We respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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